Supreme Court, U.S.
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No. ___

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IN THE

Supreme Court of the United States

CAREMARK RX, INC. (FORMERLY MEDPARTNERS, INC.),
Petitioner,

v.

J. BROOKE JOHNSTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the award of punitive damages in this case constitutes impermissible "double-counting" under this Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003, since the "compensatory" damages supporting the award are entirely punitive in nature.

PARTIES TO THE PROCEEDING

Petitioner Caremark Rx, Inc. (formerly MedPartners, Inc.) is a publicly held company. Appellee in the Alabama Supreme Court and defendant/cross-claimant in the Circuit Court of Jefferson County was J. Brooke Johnston.

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PETITION FOR A WRIT OF CERTIORARI

Caremark Rx, Inc. (formerly MedPartners, Inc.) ("Caremark") petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The order of the Circuit Court of Jefferson County, App. at 9a, is not officially reported. The trial court's Amended Final Order, App. at 14a, is similarly unreported. The judgment of the Alabama Supreme Court, App. 1a-2a, is not officially reported. The Alabama Supreme Court overruled Caremark's application for rehearing. App. 3a. This judgment is not officially reported. The order of the Alabama Supreme Court denying Caremark's emergency motion for stay of execution of the judgment, App. 4a, is not officially reported.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on May 14, 2004, and Caremark's application for rehearing was overruled on August 13, 2004. Caremark's emergency motion for stay of execution of the judgment was denied on August 31, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Caremark, based in Nashville, Tennessee, is a leading manager of prescription drug benefits for health care plans. Respondent J. Brooke Johnston was general counsel of Caremark's predecessor (MedPartners, Inc.) for only two years, from May 1996 to July 1998, when he resigned. Trial Transcript at 792. During these two years, Johnston, an experienced corporate lawyer, was highly compensated for his work. Trial Transcript at 843-44.

Caremark later sued Johnston in Alabama state court for, among other things, breach of fiduciary duty, and Johnston counterclaimed for breach of his employment contract and fraud. App. at 9a-10a (Order of Circuit Court of Jefferson County). After a mistrial caused by the misconduct of Johnston's counsel in front of the jury, the case went to trial again in January 2002.

Johnston sought damages for breach of contract in the amount of $2 million. Trial Transcript at 843. Johnston testified he gave up a position at his previous law firm to join Caremark, and that he was building a practice from scratch

after he resigned as General Counsel. Trial Transcript at 1134-36. He further testified that the funds he sought for breach of contract were intended to provide him with three years of income while he started this new firm and rebuilt his practice:

> *Question by Mr. Cook (counsel to Johnston):*
>
> > And these severance payments that were provided for in your employment contract, what was the purpose of having a contract with severance payments like existed in your contract?
>
> *Mr. Johnston:*
>
> > From my perspective, it was going to provide me with three years of income so that my family could be supported while I built my practice back up so that I could make the kind of living to which—that I was making before I made the move to MedPartners.

Trial Transcript at 1135. Johnston was awarded nearly this entire amount, $1.86 million, as compensatory damages for breach of contract. App. at 17a (verdict form). In other words, the damages Johnston was awarded for breach of contract *fully* compensated him for his inability to return to his previous firm.

Johnston's fraud claim was based solely on his own testimony about a single, oral, private, unrecorded, and short conversation he had with one member of Caremark's board of directors. Johnston testified that the director told him in January 1998 that Caremark would "honor" his employment contract if he remained with the company. Trial Transcript at 1105. Johnston presented no other evidence of fraud. The jury credited Johnston's testimony (and discredited contrary testimony from the director, who denied the conversation ever occurred) and awarded Johnston $1 million for "fraud." App. at 17a (verdict form). These damages were entirely punitive in nature. In denying Caremark's post-trial motions attacking

the verdiet, the trial court cited Johnston's inability to return to his previous firm as a basis for the "fraud" damages:

> Johnston testified that Scrushy's representation, whether innocently, deliberately, or recklessly, was false and as a result he sustained damages. He testified that at the time he left his employment with Caremark he had lost his opportunity to return to his old firm and that he was forced to begin a new law practice which would take five years to build to the point that he was earning compensation that was equal to the compensation he was earning at Caremark and which he would earn at his old firm of approximately Two Hundred Thousand Dollars ($200,000.00) per year. The jury, therefore, could believe that Johnston sustained compensatory damages in the sum of One Million Dollars ($1,000,000.00) as a result of the misrepresentation.

App. at 11a (Order of Circuit Court of Jefferson County). Accordingly, these damages could not have been anything *but* punitive in nature, because, by Johnston's own testimony, the damages he received for breach of contract fully compensated him for the time it would take to start and build a new firm. Moreover, Johnston presented no evidence that he suffered actual loss as a result of this alleged fraud. He did not offer any evidence of his income at his prior law firm, nor of his earnings during the start-up period for his new practice. The lack of evidence of any actual loss further underscores the entirely punitive nature of this damages award.

Caremark moved the trial court for judgment as a matter of law, or for a new trial or remittitur. In that motion, Caremark argued that the punitive damages award violated its right to due process under this Court's decisions in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *BMW of North America v. Gore*, 517 U.S. 559 (1996). *Id.* At that time, this Court had not yet decided *State Farm*. Caremark also cited and argued both *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539

So. 2d 218 (Ala. 1989), cases on which this Court placed great emphasis in affirming the Alabama punitive damages judgment in *Haslip*. *See* 499 U.S. at 20 (noting that there is "meaningful and adequate review by the trial court [in Alabama] whenever a jury has fixed the punitive damages.")

Although the trial court found "the reprehensibility of the conduct of the Defendant [Caremark] in this action is low," the court nevertheless denied Caremark's motion and refused to remit any of the damages awarded. App. at 12a.

Caremark thereafter appealed to the Alabama Supreme Court, which affirmed without opinion and, despite a request by Caremark, without oral argument. App. at 1a-2a. Caremark sought rehearing and in its application cited and argued this Court's relevant punitive damages decisions, including *State Farm*. The application was denied, again without opinion, on August 13, 2004. App. at 3a.

REASONS FOR GRANTING THE PETITION

This case presents an important and unsettled due process question concerning the impermissible imposition of double-counted punitive damages, described by this Court in *State Farm*, 538 U.S. at 426, 429. As explained below, the judgment awarding punitive damages that was imposed by the Jefferson County Circuit Court and upheld by the Alabama Supreme Court rested entirely on an award of "compensatory" damages that was, in fact, entirely punitive in nature. For this reason, Caremark respectfully requests that this Court grant certiorari to clarify its decision in *State Farm*. In the alternative, in the event that this Court grants State Farm's petition for certiorari in *State Farm v. Campbell*, 73 U.S.L.W. 3077 (U.S. July 20, 2004) (No. 04-116), Caremark respectfully requests that this Court hold this petition, and then grant certiorari, vacate the judgment of the Alabama Supreme Court, and remand this case for further proceedings in light of this Court's opinion in that case.

In outlining the impropriety of the grossly excessive punitive damages award upheld by the Utah Supreme Court in *State Farm*, this Court noted that the plaintiffs' compensatory damages, which were solely based on their claim of emotional distress, were "based on a component which was duplicated in the punitive award." 538 U.S. at 426. To insure that the punitive damages imposed against State Farm were not unjustified, this Court instructed that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (*a portion of which contained a punitive element*), likely would justify an award at or near the amount of compensatory damages." *Id.* at 429 (emphasis added).

In the instant case, unlike in *State Farm*, the *entire* amount of the only damages that can support an award of punitive damages—the damages awarded for "fraud"—are punitive in nature. Consequently, the ratio of punitive damages to compensatory damages is potentially infinite, and plainly unconstitutional.

Johnston sought, and the jury awarded him, the value of a very generous severance package. This amount, as Johnston testified, was intended "as a measure to replace lost income to fill in the years it takes to start up a [law] practice from scratch." Brief of Appellee Johnston (Ala. Supreme Court No. 1020026) (Jan. 23, 2003); *see also* Trial Transcript at 1135.

This is exactly the same item of damage Johnston claimed as a result of the "fraud" committed in his short, private conversation with one Caremark director. The trial court, in denying Caremark's motion for judgment as a matter of law or a new trial, held that Johnston's "fraud" damages were "that at the time he left his employment with Caremark, he had lost his opportunity to return to his old firm and that he was forced to begin a new law practice . . . ." Order of Circuit Court of Jefferson County, at 3. Because the "fraud"

damages were entirely duplicative of the breach of contract damages, the damages the jury awarded for "fraud"—even more than the emotional distress damages in *State Farm*—must have been punitive in nature.

This Court has consistently emphasized that punitive damages must bear a reasonable relationship to compensatory damages. *State Farm*, 538 U.S. at 425 ("Single-digit multipliers are more likely to comport with due process . . . ."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (noting that appellate courts are "equally capable" with trial courts of applying the *Gore* ratio guideposts); *Gore*, 517 U.S. at 581 ("[A] comparison between the compensatory award and the punitive award is significant."); *Haslip*, 499 U.S. at 23 (noting that ratio "may be close to the line"). In this case, such a reasonable relationship does not exist, because the "compensatory" portion of the "fraud" damages—the only portion of Johnston's compensatory damages that can support an award of punitive damages—is zero. Johnston presented no evidence of any damages other than his breach of contract damages. The $1 million in "fraud" damages awarded by the jury, accordingly, was entirely punitive in nature, and any punitive damages based upon this "fraud" award are impermissibly double-counted.

Although some lower courts have heeded this Court's admonition against duplicating the punitive element of a compensatory damages award, *see, e.g., Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (pointing to an award of attorneys' fees in a sexual discrimination case as "including a certain punitive element" and to that extent as favoring a lesser rather than greater award of punitive damages); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 424 (S.D.N.Y. 2003) ("[D]espite the stock bromides generally pronouncing that the aim of compensatory damages is solely to restore the plaintiff's loss and not to

punish the defendant, in fact this restitutional remedy does possess a deterrent and punitive aspect as well. This objective manifests especially in cases in which the wrongdoer is known and the injury is monetarily recompensed to the full extent of the proven damages . . . ."); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 763 (Cal. Ct. App. 2003) ("Our independent review in this case convinces us that the extreme reprehensibility of defendant's actions and the undercompensation of plaintiffs' individual losses outweigh the punitive element already contained to some extent in the individual compensatory damages awards."); *Hollock v. Erie Ins. Exch.*, 2004 Pa. Super. 13, ¶ 40 (Pa. Super. Ct. 2004) ("Unlike the compensatory award in *Campbell* which permitted recovery for emotional distress, the compensatory award in this case [attorneys' fees, costs, and interest only] did not include any punitive element."); *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 75 (S.D. 2003) ("In this case, where there was a substantial compensatory damage award containing a punitive element which fully compensated [plaintiff] for the harm caused, we find 'a punitive damages award at or near the amount of compensatory damages' is justified."); *Gibson v. Overnite Transp. Co.*, 2003 Wis. App. 210, ¶ 23 n.3 (Wis. Ct. App. 2003) ("Here, $22,000 of the $33,000 awarded for compensatory damages was for financial damages. As a result, the compensatory damage award had little, if any, punitive element."), both the Utah Supreme Court in *State Farm* and the Alabama Supreme Court here failed to do so. The opinion of the Utah Supreme Court in *State Farm* on remand, like the judgment of the Alabama Supreme Court in this case, demonstrates the confusion that remains in the lower courts surrounding the double-counting of punitive damages. Caremark respectfully requests that the Court demonstrate that it meant what it said—the "punitive element" of an award of compensatory damages should not be counted in calculating the permissible ratio for an award of punitive damages. *Compare State Farm*, 538 U.S. at 429

("An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."), *with Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188 at *9 (Utah April 23, 2004) (stating that this Court's "conclusion, though plausible as an abstract proposition, does not account for the circumstances of the compensatory damages award in this case").

This case presents an even more compelling example of unlawful double-counting than *State Farm*. There, the trial court had granted a remittitur of a portion of the plaintiffs' emotional distress damages. Furthermore, those emotional distress damages were the only compensatory damages the plaintiffs received; they were, at least in part, truly compensatory. Here, by contrast, there has been no remittitur, and Johnston's "fraud" damages were in *no* part compensatory; by his own testimony, he was fully compensated by the breach of contract damages. Therefore the Alabama Supreme Court's refusal in this case to properly evaluate the punitive damages award in light of this court's opinion in *State Farm* was particularly prejudicial.

For these reasons, this Court should grant certiorari in this case to clarify the due process problems inherent in "double-counting" punitive damages. This case presents a starkly compelling example of such unconstitutional double-counting, because the only "compensatory" damages which could support the punitive award in this case are entirely punitive themselves. However, the Court may wish instead to grant certiorari in *State Farm*, clarifying its position using ground already tilled. In that event, if this Court decides *State Farm* in favor of the petitioner on the ground that the Utah Supreme Court impermissibly double-counted the punitive damages against State Farm, this Court should grant

Caremark's petition, vacate the judgment below, and remand the case to the Alabama Supreme Court for reconsideration in light of this Court's ruling in that case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, should the Court grant certiorari in *State Farm*, the petition should be held pending the Court's decision in that case, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted,

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